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Nos. 10-929, 10-931, 10-932 and 10-1058

In the Supreme Court of the United States

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE, ET AL.

SOUTHERN MISSOURI RECYCLING AND WASTE MANAGEMENT DISTRICT, PETITIONER

v.

YANKTON SIOUX TRIBE ET AL.

PAM HEIN, STATE'S ATTORNEY OF CHARLES MIX COUNTY, ET AL., PETITIONERS

v.

YANKTON SIOUX TRIBE ET AL.

YANKTON SIOUX TRIBE, ET AL., PETITIONERS

v.

DENNIS DAUGAARD, GOVERNOR OF SOUTH DAKOTA, ET AL.

ON PETITIONS AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, did not wholly disestablish the Yankton Sioux Reservation.

2. Whether the Yankton Sioux Reservation includes all lands within its original boundaries other than those the Tribe ceded to the United States for sale to non-Indians in the 1894 Act.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-51a)[1] is reported at 606 F.3d 994. The memorandum opinion and order of the district court (Pet. App. 122-163) is reported at 529 F. Supp. 2d 1040. A prior opinion of the court of appeals (Pet. App. 199-249) is reported at 188 F.3d 1010. A prior memorandum opinion and order of the district court (Pet. App. 250-320) is reported at 14 F. Supp. 2d 1135.

JURISDICTION

The original judgment of the court of appeals was entered on August 25, 2009. The court of appeals denied rehearing en banc and issued an amended opinion on May 6, 2010. Subsequent petitions for rehearing were denied on September 20, 2010 (Pet. App. 321-322). On December 14, 2010, Justice Alito extended the time within which to file petitions for writs of certiorari to and including January 18, 2011 (Pet. App. 323), and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The conditional cross-petition was filed on February 22, 2011.

STATEMENT

1. Section 1151 of Title 18 classifies three categories of land as "Indian country": "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"; "(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired

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[1] Citations in this brief to the petition appendix refer to the petition appendix in No. 10-929.

territory thereof, and whether within or without the limits of a state"; and "(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." For land in any of these three categories, criminal jurisdiction in cases involving tribal members generally rests primarily with the United States and the particular Indian tribe, rather than the State in which the Indian country lies. See 18 U.S.C. 1151-1153. The same distinction "generally applies * * * to questions of civil jurisdiction" as well. *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975); see *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

2. The Treaty of April 19, 1858, 11 Stat. 743 (Pet. App. 324-336), established a 430,000-acre Reservation for the Yankton Sioux Tribe (Tribe) in what is now Charles Mix County in southeastern South Dakota. Pet. App. 5-6. Roughly 30 years later, Congress authorized the Executive Branch to divide portions of Indian reservations into allotments: individual parcels of land that would be held in trust by the United States for the benefit of individual tribal members to whom the parcels could eventually be conveyed in fee. See Indian General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887); Act of Feb. 28, 1891, ch. 383, 26 Stat. 794. More than 262,000 non-contiguous acres of the Yankton Sioux Reservation were allotted. Pet. App. 8.

In 1892, Congress directed the Secretary of the Interior to negotiate with the Tribe for the sale of surplus reservation lands that were not needed for allotments. Act of July 13, 1892, ch. 164, 27 Stat. 137. In December 1892, tribal leaders signed an agreement (the 1892 Agreement), later adopted by a majority of the Tribe, in which the Tribe agreed to "cede, sell, relinquish, and

convey" its interest in all the unalloted lands—approximately 168,000 acres interspersed among the allotments—within the Reservation for $600,000. Pet. App. 8, 339. Although the Agreement specified that most of the ceded land would be sold to non-Indian settlers, a portion was exempted from such sale and set aside for continued use by the United States for Indian agency, schools, and other tribal-support purposes for as long as necessary. *Id.* at 342-343. In 1894, Congress "accepted, ratified, and confirmed" the 1892 Agreement. Act of Aug. 15, 1894, ch. 290, § 12, 28 Stat. 319 (1894 Act).

3. In *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998), this Court held that the 1894 Act diminished the Reservation by severing the unallotted ceded lands from the Reservation. In reaching that result, the Court principally relied upon the "'cession' and 'sum certain'" language in the 1894 Act, by which the Tribe ceded and conveyed all of its interest in the unallotted lands for a sum certain. *Id.* at 344. The Court had previously held that such language creates an "almost insurmountable" presumption of diminishment. *Ibid.*; *Hagen* v. *Utah*, 510 U.S. 399, 411 (1994); *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984).

The land at issue in *Yankton Sioux Tribe* was unallotted land ceded to the United States by the 1894 Act for sale to settlers. The Court therefore found it unnecessary to decide whether the Reservation had been wholly disestablished. 522 U.S. at 358.

4. On remand, the district court consolidated the original action, *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District* (No. 94-4217), with a new action, *Yankton Sioux Tribe* v. *Gaffey* (No. 98-4042). In the new action, the Tribe sought declaratory and injunctive relief precluding the State of South

Dakota and Charles Mix County from exercising criminal jurisdiction over tribal members on (1) any lands that had been allotted to members of the Tribe, whether or not those lands are now held in trust by the United States for the Tribe or individual members, and (2) the lands that had been reserved from sale to non-Indians under the 1894 Act for Indian agency, school, and other purposes, which are at present held in trust by the United States for the Tribe. The United States, which had previously participated in the original action as an amicus curiae, intervened in the consolidated action. Pet. App. 202-203.

The district court, after taking additional evidence, held that Congress had not disestablished the Yankton Sioux Reservation. Pet. App. 253. The court concluded that the 1894 Act had "modified or reconceptualized" the Reservation to consist of all of the lands within the original 1858 exterior boundaries that had not been ceded to the United States for sale to non-Indian settlers; accordingly, the Reservation continued to consist of "all of the reservation lands that were allotted pursuant to the allotment acts, as well as the lands reserved from sale for agency, school, and other tribal purposes." *Ibid.* The court based that conclusion on the text of the 1894 Act and the 1892 Agreement, the record of negotiations between the United States Commissioners and the Tribe, the materials submitted to Congress in connection with passage of the 1894 Act, and the subsequent treatment of the allotted lands by the United States, the State, and the Tribe. *Id.* at 250-321.

5. The court of appeals affirmed in part and reversed in part. Pet. App. 199-249. It agreed with the district court that the Reservation had not been disestablished. *Id.* at 203. But the court held that the Reservation had

been further diminished to exclude not only the unalloted ceded lands that were the subject of this Court's decision in *Yankton Sioux Tribe*, but also additional lands that had passed into non-Indian hands. *Id.* at 247.

a. At the outset, the court of appeals recited the well-settled principles governing the analysis of reservation diminishment and disestablishment questions. First, the court noted that "[c]ongressional intent is the touchstone" for determining whether a reservation has been diminished or disestablished, and thus that land set aside for a reservation retains that status until Congress indicates otherwise. Pet. App. 224 (citing *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 586 (1977), and *Solem*, 465 U.S. at 470). Second, the court noted that Congress's "[i]ntent to diminish or disestablish a reservation must be 'clear and plain,'" and "expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 225 (quoting *United States* v. *Dion*, 476 U.S. 734, 738 (1986), and *Mattz* v. *Arnett*, 412 U.S. 481, 505 (1973)). Third, the court noted that "neither diminishment nor disestablishment will be found lightly," and that any ambiguities in statutes or agreements bearing on the question are resolved in favor of the Tribe. *Id.* at 229 (citing *Yankton Sioux Tribe*, 522 U.S. at 344; *Hagen*, 510 U.S. at 411). Finally, the court noted that each statute that is claimed to have disestablished or diminished a reservation "must be analyzed individually, its effect depending on the language used and the circumstances of its passage." *Id.* at 228 (citing *Solem*, 465 U.S. at 469).

b. The court of appeals held that no sufficiently clear expression of Congress's intent to disestablish the Yankton Sioux Reservation could be found in the text of

the 1894 Act and the incorporated 1892 Agreement, in the record of the negotiations between the United States and the Yankton Sioux, or in the other materials before Congress at the time of the adoption of the 1894 Act. Pet. App. 229-243.

The court of appeals observed that Articles I and II of the 1894 Act—the provisions principally relied on by this Court in *Yankton Sioux Tribe*—"refer[] explicitly only to the ceded lands." Pet. App. 229. The court determined that three other articles of the 1894 Act contemplated some degree of continuing tribal governance over the allotted lands. The court concluded that Article V, which provided for an optional fund that could be used, among other things, for schools, courts, and "other local institutions for the benefit of said tribe," "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux." *Id.* at 238-239; see *id.* at 340-341. The court viewed Article XVII, which prohibited the sale of liquor "upon any of the lands by this agreement ceded and sold to the United States" and "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians," as "acknowledg[ing] the continued existence of two distinct categories of land to which different laws might apply." *Id.* at 239-240; see *id.* at 239 (Article XVII "signal[ed] a jurisdictional distinction between reservation and ceded land") (quoting *Yankton Sioux Tribe*, 522 U.S. at 350) (brackets in original). And the court read Article VIII, which reserved from sale to settlers those ceded lands "as may now be occupied by the United States for agency, schools, and other purposes," as indicating that "some lands were expected to remain outside of primary state jurisdiction." *Id.* at 240.

The court of appeals likewise found no clear indication of an intent to disestablish the Reservation in the record of the negotiations between the United States and the Tribe. Pet. App. 231-237. The court observed that the United States Commissioners who negotiated the 1892 Agreement had "repeatedly emphasized" to the Tribe that "their primary objective was the purchase of the *unallotted* lands." *Id.* at 232. The court noted that the Commissioners had also "indicated that the tribal leadership would retain some governing powers," and it viewed such indications as "suggest[ing] the parties did not intend to disestablish the reservation." *Id.* at 233. The court further observed that the Commissioners' subsequent report to Congress did not equate the Tribe's sale of the surplus lands with the Tribe's immediate loss of sovereignty over the unceded lands. *Id.* at 235-237. The report instead reflected what the court described as the parties' understanding that "only a portion of the reservation was being separated at that time." *Id.* at 236.

The court of appeals additionally concluded that "treatment of the Yankton area in the years following passage of the [1894] Act provides further evidence that the nonceded lands retained their reservation status until they passed out of trust." Pet. App. 243-244. Among other things, the court of appeals discussed evidence in the record regarding the Tribe's maintenance of a tribal police force and an independent judicial system, and Congress's "definitive and considered step" when, in 1929, it decided to return the lands previously reserved for tribal-support purposes to the Tribe and prohibited the allotment of those lands. *Id.* at 244-246 & n.12.

c. The court of appeals concluded, however, that the 1894 Act intended to diminish the Reservation not only by removing the ceded land, but also other (allotted) land that subsequently passed into the hands of non-Indians. Pet. App. 243, 247. The court stated that the 1894 Act, when "read in its full historical context," contemplated that tribal members would eventually obtain fee title to their allotted lands and gain the ability to sell those lands to non-Indians, and the lands would thus become subject to the civil and criminal laws of the State. *Id.* at 243. The court of appeals did not determine precisely which lands—other than roughly 1000 acres originally reserved in the 1894 Act for tribal-support purposes, which Congress, in 1929, specified should be returned to the Tribe, see Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167 (1929 Act)—remained within the surviving Reservation, instead remanding to the district court to make that determination in the first instance. Pet. App. 248-249.

6. The State, the County, and the waste management district (collectively, "petitioners"), and also the Tribe, filed petitions for writs of certiorari. They presented the same issues for review that they present here: petitioners contended, contrary to the court of appeals, that the Reservation had been disestablished; the Tribe contended, contrary to the court of appeals, that the present-day Reservation includes allotted lands that have passed out of Indian ownership. See 99-1490 Pet. 11-29; 99-1683 Pet. 4-22. The United States urged the Court to deny both petitions, U.S. Br. in Opp., Nos. 99-1490 and 99-1683, and the Court denied certiorari. See *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000); *Yankton Sioux Tribe* v. *Gaffey*, 530 U.S. 1261 (2000).

7. On remand, the district court held that the following lands remained within the Reservation, and were therefore Indian country under 18 U.S.C. 1151(a): (1) land allotted to members of the Tribe in 1894 and held continuously in trust by the United States for the benefit of the Tribe or its members since that time (30,051.66 acres); (2) land taken into trust by the United States for the benefit of the Tribe under the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (6444.47 acres); (3) land reserved to the United States in 1894 and returned to the Tribe pursuant to the 1929 Act (913.83 acres); and (4) Indian-owned fee land that has been continuously in Indian hands since 1894. Pet. App. 162; see *id.* at 82.

The district court held in the alternative that, for two independent reasons, lands in categories 1 and 2 above would be Indian country for jurisdictional purposes even if they were *not* part of a formally designated reservation. First, the court determined that those lands, if not part of a formal reservation, constituted an "informal" or "de facto" reservation, and thus would still be Indian country under Section 1151(a). Pet. App. 153-157. The court observed that under this Court's decisions, "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation,'" but instead on "whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.* at 153 (quoting *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (some quotation marks omitted). The court concluded, based on the evidence of federal superintendence, that the lands met this definition. *Id.* at 156.

Second, the court determined that these lands also constituted a "dependent Indian community" under Section 1151(b). *Id.* at 159-160. "The Supreme Court," it explained, "established two requirements for off-reservation land to qualify as a dependent Indian community under § 1151(b): 'a federal set-aside and a federal superintendence requirement.'" *Id.* at 160 (quoting *Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 530) (emphasis omitted). The court held, based on the evidence, that the lands satisfied these requirements. *Ibid.*

8. a. The court of appeals affirmed in part and vacated in part. Pet. App. 71-121. It reaffirmed its previous determination that the land reserved for tribal-support purposes in 1894 and returned to the Tribe under the 1929 Act was reservation land. *Id.* at 90-94. It also affirmed the district court's conclusion that two other categories of trust land—allotted land held continuously in trust by the United States and land taken into trust under the IRA—were part of the reservation as well. *Id.* at 97-112.[2] The court of appeals expressly recognized that these latter two categories of land would be considered Indian country even if the reservation had been disestablished. It observed that all parties conceded that the allotted trust lands would be Indian country under Section 1151(c), which specifically addresses allotments. *Id.* at 97-98. And it further observed that the IRA trust land would be Indian country pursuant to 25 U.S.C. 465. Pet. App. 105-107; see *id.* at 106 ("[S]ec-

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[2] The court of appeals noted that the district court had identified, but had not expressly addressed the status of, an additional 174.57 acres of trust land that had been taken into trust under statutes other than the IRA. Pet. App. 82-83, 112. The court of appeals concluded that these lands were "dependent Indian communities" and thus Indian country under Section 1151(b). *Id.* at 112-114.

tion 465 provides the proper avenue for a tribe to reestablish sovereign authority over territory.") (quoting *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005)) (brackets omitted)).

The court of appeals vacated, however, the district court's conclusion that continuously-Indian-owned fee lands are part of the Reservation. Pet. App. 114-116. It deemed the issue unripe because the record was undeveloped; among other things, it was not clear that any such lands existed. *Id.* at 115-116.

b. The panel granted in part petitioners' request for panel rehearing. Pet. App. 52-70. Petitioners' request "focus[ed] on dicta in a single footnote of [the court's] 37 page decision." *Id.* at 54. Petitioners argued that the footnote indicated that a certain set of lands—lands allotted to Indians in 1894 but sold to non-Indians after the enactment of Section 1151 in 1948—were part of the Reservation, and they (along with amici) claimed that various detrimental consequences flowed from that result. *Id.* at 58-59. The court explained that petitioners had "raised a straw man to attack" and were "well aware that the wording to which they object is not part of the judgment in this case." *Id.* at 59-60. The court nevertheless amended and reissued the opinion, removing language that might be "misunderstood" as reaching the issue of allotted lands transferred to non-Indians after 1948, but otherwise leaving the decision unaltered. *Id.* at 56; see *id.* at 1-51 (amended opinion).

ARGUMENT

The court of appeals correctly concluded that the Yankton Sioux Reservation has not been wholly disestablished and that the Reservation includes approximately 37,410 acres held in trust by the United States.

That fact-bound decision does not conflict with any decision of this Court or any other court of appeals. Nor does it have any significant practical consequence, given the jurisdictional treatment of the specific trust lands at issue in this case. For reasons largely explained by the lower courts, the trust lands are Indian country, and therefore presently subject primarily to federal and tribal jurisdiction rather than state jurisdiction, whether or not the Yankton Sioux Reservation was disestablished by the 1894 Act. Further review of the question presented by petitioners (regarding whether the Reservation was disestablished), as well as the question presented in the conditional cross-petition (regarding the extent of the Reservation), is accordingly unwarranted.

1. In concluding that the Reservation was not wholly disestablished in 1894, the court of appeals applied the standards repeatedly articulated by this Court, see, *e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343-344 (1998), to the particular facts and circumstances of this case. Such a fact-specific application of settled legal standards does not merit this Court's review. See Sup. Ct. R. 10.

As the court of appeals recognized (Pet. App. 225), Congress's intent to diminish or disestablish a reservation must be "clear and plain," under a standard that considers the text of the relevant surplus land Act, the legislative history, and the surrounding circumstances. *Yankton Sioux Tribe*, 522 U.S. at 343-344 (quoting *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986)); *Hagen* v. *Utah*, 510 U.S. 399, 411-412 (1994); *Solem* v. *Bartlett*, 465 U.S. 469, 470-471 (1984). "This Court does not lightly conclude that an Indian reservation has been terminated," and it resolves ambiguities in favor of the

tribe. *DeCoteau* v. *District County Court*, 420 U.S. 425, 444 (1975).

There was no expression of congressional intent, much less the "clear and plain" expression required by this Court, to disestablish the Yankton Sioux Reservation. The primary purpose of the 1894 Act was to transfer unallotted surplus lands from the Yankton Sioux Tribe to the United States. That transfer was accomplished by Articles I and II of the 1894 Act—the provisions that this Court principally relied upon in *Yankton Sioux Tribe*—which provided for the cession and conveyance of the surplus lands and established the amount of payment for those lands. See 522 U.S. at 344-345. Those articles refer only to the unallotted surplus lands, not to the lands that were to be allotted to tribal members. Pet. App. 339.[3]

No other provision of the 1894 Act offers any clear indication that Congress intended that the cession of the unallotted (or "surplus") lands would result in the disestablishment of the entire Reservation. Indeed, several

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[3] The County errs in asserting (County Pet. 24-25) that the "cession and sum certain" language contained in these articles gives rise to a "disestablishment presumption." As the decisions in both *Yankton Sioux Tribe* and *Solem* explain, such language creates only a "presumption of *diminishment*" (*i.e.*, that the reservation was reduced by the area sold), not a presumption of *disestablishment* (*i.e.*, that the reservation was eliminated entirely). *Yankton Sioux Tribe*, 522 U.S. at 344 (emphasis added); see *Solem*, 465 U.S. at 470-471. This Court has already applied the diminishment presumption in *Yankton Sioux Tribe* to find that the Reservation was diminished to the extent lands were ceded to the United States for sale to non-Indians. See 522 U.S. at 351. The question now is one of complete disestablishment, and, as explained in the text, the presumption favors the continuation of the reservation, unless congressional intent to the contrary is clearly shown.

provisions of the 1894 Act and the incorporated 1892 Agreement point to the opposite conclusion.

Article VIII of the 1894 Act reserved from sale to non-Indian settlers those lands ceded by the Tribe to the United States "as may now be occupied by the United States for agency, schools, and other purposes." 28 Stat. 316 (Pet. App. 342-343). This Court recognized in *Yankton Sioux Tribe* that Article VIII "counsels against finding the reservation terminated," because Congress probably would not have reserved lands for such purposes if it had not anticipated a continuing Reservation. 522 U.S. at 350; accord *Solem*, 465 U.S. at 474. The court of appeals similarly viewed Article VIII as reflecting "Congress' expectation that the federal government would continue to have a significant presence in the area for the welfare of the Tribe," so that "some lands were expected to remain outside of primary state jurisdiction." Pet. App. 240.

Article XVII of the 1894 Act prohibited the sale or offering of intoxicating liquors "upon any of the lands by this agreement ceded and sold to the United States" *and* "upon any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians as described in the [1858] treaty." 28 Stat. 318 (Pet. App. 347). As this Court observed in *Yankton Sioux Tribe*, Article XVII "thus signal[s] a jurisdictional distinction between reservation and ceded land." 522 U.S. at 350; see Pet. App. 239-240 (observing that Article XVII "acknowledged the continued existence of two distinct categories of land to which different laws might apply").

Article V of the 1894 Act provided a mechanism for funding, from interest due the Tribe on proceeds from the sale of ceded lands, various post-cession tribal activities, such as the care of "orphans, and aged, infirm, or

other helpless persons of the Yankton tribe," schools and educational programs, and "courts of justice and other local institutions for the benefit of said tribe." 28 Stat. 315 (Pet. App. 341). Article XI provided an additional source of funding for those activities from the sale of lands of tribal members who died intestate. 28 Stat. 317 (Pet. App. 344). The court of appeals recognized that those provisions, which "clearly foresaw continued tribal activity in providing for the needs of the Yankton Sioux," militate against a determination that Congress intended to disestablish the Reservation. Pet. App. 239.[4]

The record of the negotiations of the 1892 Agreement between the United States Commissioners and the Yankton Sioux likewise provides no indication of an intent to disestablish the Reservation. The Commissioners repeatedly informed the Tribe during the negotiations that they had one primary purpose—to purchase the Tribe's unallotted surplus lands. Pet. App. 232-234; (citing S. Exec. Doc. No. 27, 53d Cong., 2d Sess. 48 (1894) (Negotiation Record)). That purpose was consistent with the continued existence of a Reservation. As the district court observed, "[a]t no point in the Commissioners' reports is there any mention, by a Commissioner or by a Yankton Sioux, of any anticipated change in the reservation boundaries or of a disestablishment or termination of the Yankton Sioux Reservation." *Id.* at 284.

The negotiation records were submitted to Congress by the Secretary of the Interior to support ratification of the 1892 Agreement. Pet. App. 232. The congressional debates on the ratification did not address the status

[4] As the court of appeals noted (Pet. App. 238-239), the fund referred to in Articles V and XI "was never actually created, but the fact that it was provided for in the statute has relevance on the question of intent."

of the allotted lands within the Yankton Sioux Reservation. See, *e.g.*, 26 Cong. Rec. 6426 (1894) (statement of Rep. Pickler of South Dakota) ("We simply provide in this bill how these 168,000 acres of land acquired from the Indians shall be disposed of."); cf. *Yankton Sioux Tribe*, 522 U.S. at 353 (observing that "[t]he legislative history itself adds little").

Subsequent actions by Congress, and the on-the-ground-facts, likewise do not support a conclusion that the Reservation was disestablished. Pet. App. 244. As the court of appeals explained, Congress's decision in 1929 to return certain reserved lands to the Tribe provides some additional evidence that Congress "always intended" to provide a "property site" for tribal-support activities. See *id.* at 244-245. The Tribe additionally presented uncontested evidence that it maintained a tribal police force and an independent judicial system following passage of the 1894 Act. *Id.* at 246 & n.12.

In sum, the court of appeals correctly concluded that no clear indication of congressional intent to disestablish the Yankton Sioux Reservation could be found in the text of the 1894 Act and the 1892 Agreement, in the legislative history, or in the surrounding circumstances.[5] Pet. App. 241. Not only is there no reason for the Court to revisit that conclusion, but, contrary to the State's contention (State Pet. 36-37), review by this Court would

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[5] The State appears briefly to suggest (State Pet. 24-26) that this Court's decision in *Yankton Sioux Tribe*, in combination with the State's interpretation of the record, demonstrates that the Reservation was, in fact, disestablished. The State misinterprets *Yankton Sioux Tribe*. The Court in that case expressly declined to reach the disestablishment issue, 522 U.S. at 358, and recognized that certain provisions of the 1854 Act cut *against* disestablishment, *id.* at 350. See p. 15, *supra*.

not provide any useful guidance to lower courts in deciding other Indian-country cases. Other cases would necessarily involve different treaties between the United States and the particular tribe; different statutes; different historical circumstances; different subsequent settlement activity; and different treatment of the opened lands by the United States, the State, and the relevant tribe. Cf. *Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land Acts diminished reservations and other surplus land Acts did not.") (citations omitted). Certiorari is accordingly unwarranted.

2. Petitioners contend (State Pet. 16-26; County Pet. 16-35; SMRWMD Pet. 6-11) that the court of appeals' decision conflicts with the South Dakota Supreme Court's decision in *Bruguier* v. *Class*, 599 N.W.2d 364 (1999), and with this Court's decision in *DeCoteau* v. *District County Court*, *supra*.[6] Petitioners made the exact same contention in their previous petition for certiorari on the question presented here, which the Court denied. See 99-1490 Pet. 11-20; *South Dakota* v. *Yankton Sioux Tribe*, 530 U.S. 1261 (2000). The contention is mistaken.

a. Contrary to petitioners' assertion of a conflict between the decision below and the Supreme Court of South Dakota's decision in *Bruguier*, the actual holdings of the two cases are identical. Both hold that allotted lands within the exterior boundaries of the original

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[6] The Southern Missouri Recycling and Waste Management District additionally contends (SMRWMD Pet. 11-13) that the court of appeals' decision in this case conflicts with that court's previous decision in *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967). Even assuming such a conflict existed, it would be for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Yankton Sioux Reservation now owned by non-Indians do not constitute "Indian country" under 18 U.S.C. 1151, and consequently that the State, not the United States and the Tribe, has primary jurisdiction over crimes committed on those lands.

In *Bruguier*, the defendant was convicted of a state criminal offense for committing a burglary in Pickstown, South Dakota, which is within the exterior boundaries of the original Yankton Sioux Reservation. 599 N.W.2d at 365. He subsequently sought habeas corpus relief, claiming that the offense occurred in Indian country, and thus that the State lacked jurisdiction over him. *Id.* at 365-366. The parties stipulated that the offense occurred on allotted land to which Indian title had been extinguished. *Id.* at 366. The land had been sold in fee to a non-Indian, and was neither trust land, a dependent Indian community, nor property held by the Tribe. *Id.* at 377-378.

In denying habeas relief, the South Dakota Supreme Court reasoned that the 1894 Act disestablished the Yankton Sioux Reservation. *Bruguier*, 599 N.W.2d at 378. But the court's actual holding was limited to the narrower issue presented in the case: whether the land on which the offense was committed constituted Indian country, and thus whether primary jurisdiction over the defendant's crime rested with the United States and the Tribe or, alternatively, with the State. The court acknowledged the limited scope of its holding, stating at the outset of its opinion: "Here we must decide the status of *allotted* lands, which have passed into non-Indian ownership." *Id.* at 365. The court concluded that such lands do not constitute Indian country. *Ibid.*

The court of appeals in this case likewise held that formerly allotted lands that now are owned by

non-Indians "are not part of the Yankton Sioux Reservation and are no longer Indian country." Pet. App. 247; see *id.* at 17. Thus, as the court of appeals recognized, *Bruguier* addressed "a category of land" that the court of appeals had "held was *not* part of a diminished reservation." *Id.* at 23 n.7 (emphasis added). Under the holdings of both the Supreme Court of South Dakota and the Eighth Circuit, the State had primary jurisdiction over the offense at issue in *Bruguier*, and indeed has jurisdiction over offenses on *all* allotted lands that have passed out of trust status and are now in non-Indian ownership.

Nor is any disagreement evident between the court of appeals and the Supreme Court of South Dakota that trust lands within the original exterior boundaries of the Reservation *are* Indian country. The Supreme Court of South Dakota stated that the land at issue in *Bruguier* was not trust land, 599 N.W.2d at 378, and repeatedly recognized that certain lands might be Indian country even without a formal reservation, see *id.* at 370-371, 376, 378. For reasons explained at pp. 24-30, *infra*, federal law does indeed classify the trust lands as Indian country irrespective of formal reservation status.

The decision of the court of appeals in this case thus does not present a "conflict[] with a decision by a state court of last resort," Sup. Ct. R. 10(a), of the sort that warrants this Court's review. The Court has stated that it "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (citation omitted)). Where, as here, there is a difference in reasoning but not result, this Court's intervention is unwarranted.

b. The court of appeals' decision also does not conflict with this Court's decision in *DeCoteau*, which held that another South Dakota Reservation, the Lake Tra-

verse Reservation of the Sisseton-Wahpeton Tribe, had been disestablished.

This Court has cautioned against automatically extending a decision holding that one reservation was disestablished or diminished to another reservation, explaining that the "effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage." *Hagen*, 510 U.S. at 410 (quoting *Solem*, 465 U.S. at 469); see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (rejecting, as contrary to "basic principles of treaty construction," the argument that "similar language in two Treaties involving different parties has precisely the same meaning," because "the historical record" and "the context of the treaty negotiations" must be examined "to discern what the parties intended by their choice of words"). Here, the text of the surplus land Act and the circumstances surrounding its enactment differ in several significant respects from those in *DeCoteau*.

As for the statutory language, although both surplus land Acts provide for a cession of surplus lands for a sum certain, the 1894 Act concerning the Yankton Sioux Reservation contains provisions that do not have counterparts in the Act of Mar. 3, 1891, ch. 543, 26 Stat. 989 (Sisseton-Wahpeton Act), that ratified the agreement with the Sisseton-Wahpeton Tribe. The Sisseton-Wahpeton Act did not have a provision analogous to Article VIII of the 1894 Act, which reserved from sale to settlers those surplus lands occupied by the United States for Indian agency, school, and other purposes. 28 Stat. 316; see *Yankton Sioux Tribe*, 522 U.S. at 350 (stating that such a provision counsels against finding the Reservation disestablished). The Sisseton-

Wahpeton Act also did not have a provision analogous to Article XVII of the 1894 Act, which expressly prohibited the sale of liquor on both the newly ceded lands and on "any other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians." 28 Stat. 318; see *Yankton Sioux Tribe*, 522 U.S. at 350 (suggesting that such a provision draws a "jurisdictional distinction" between ceded lands and reservation lands). Nor did the Sisseton-Wahpeton Act have provisions analogous to Articles V and XI of the 1894 Act, which provided a mechanism to fund schools, courts, and "other local institutions for the benefit of [the] tribe." 28 Stat. 315, 317. Accordingly, the 1894 Act, in contrast to the Sisseton-Wahpeton Act, contemplated a continuing role for the United States and the Tribe in the area and a jurisdictional distinction between ceded and other reservation lands.

As for the surrounding circumstances, the Sisseton-Wahpeton expressed their understanding, with a clarity that the Yankton Sioux did not, that the cession of their surplus lands and the allotment of their remaining lands would terminate their Reservation. As the court of appeals observed, "[t]he background of the Lake Traverse agreement was very different from that of the 1894 Act, * * * because the tribal members there had expressed their clear desire to terminate their reservation." Pet. App. 220-221. For example, this Court noted that spokesmen for the Sisseton-Wahpeton Tribe had stated that "[w]e never thought to keep this reservation for our lifetime," *DeCoteau*, 420 U.S. at 433; that "[w]e don't expect to keep [the] reservation," *ibid.*; and that "[t]his little reservation * * * was given us as a permanent home, but now we have decided to sell," *id.* at 436-437 n.16. In contrast, the "circumstances sur-

rounding the negotiation of the 1892 Agreement with the Yankton Sioux and the difficulty in obtaining tribal votes to ratify it are significantly different, and there was no expression by the Indians of an intent to eliminate their reservation." Pet. App. 221.

Finally, the Sisseton-Wahpeton Tribe negotiated for substantially more allotted acreage per capita than was provided by the Dawes Act or was received by the Yankton Sioux under the 1894 Act. The Dawes Act, pursuant to which the allotments to the Yankton Sioux were made, provided that heads of household were to receive 160 acres, single persons over 18 or orphans were to receive 80 acres, and other persons were to receive 40 acres. Pet. App. 262 (citing 24 Stat. 388). In contrast, each Sisseton-Wahpeton member, "regardless of age or sex," received a 160-acre allotment. *DeCoteau*, 420 U.S. at 435; see *id.* at 438 n.19 (quoting the Senate Committee Report on the Sisseton-Wahpeton agreement as explaining that "the departure from the general allotment act of 1887 in the case of these Indians is just and proper," principally because "the additional allotments are in lieu of any residue which, under their title, these Indians could have reserved for the future benefit of their families"). The court of appeals thus recognized that the agreement in *DeCoteau* differed significantly from the agreement here, because the Sisseton-Wahpeton, in "exchange" for the termination of their Reservation, "negotiated allotments for each individual, including married women." Pet. App. 221. The Yankton Sioux did not.[7]

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[7] The State argues (State Pet. 22) that present-day demographics also show a similarity between this case and *DeCoteau*. Even assuming present-day demographic evidence could suffice to show disestablishment in 1894, the State misinterprets the significance of the evidence

In sum, given the significant differences in the language of the surplus land Acts involving the Yankton Sioux Reservation and the Lake Traverse Reservation as well as in the circumstances surrounding their enactment, no conflict exists between the decision below and this Court's decision in *DeCoteau*.

3. The question presented by petitioners regarding the Reservation's disestablishment does not merit review for the additional reason that it is of little practical consequence. The only lands that the court of appeals found to be Indian country under 18 U.S.C. 1151(a) based on their reservation status were (1) allotted lands held in trust by the United States for tribal members; (2) lands acquired by the United States since 1934 and held in trust for the Tribe pursuant to the IRA; and (3) lands that were ceded to the United States under the 1894 Act but reserved for Indian "agency, schools, or other purposes," were later returned to the Tribe, and are now held in trust by the United States for the benefit of the Tribe. See p. 11, *supra*. All of these lands would be Indian country even if the Reservation *had* been disestablished, as petitioners contend.[8]

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here. As the figures cited by the State demonstrate, whereas Indians were less than 10% of the relevant population in *DeCoteau*, they make up roughly one-third of the population here. See Pet. App. 315 (district court emphasizing demographic differences between this case and *DeCoteau*).

[8] To the extent that the State's criticism (State Pet. 26-35) of the court of appeals' decision could be read to touch upon these alternative grounds for Indian-country status, such arguments are not encompassed within the question presented in the State's petition, which seeks review only of "[w]hether the Act of 1894 disestablished the Yankton Sioux Reservation." State Pet. i.

a. The vast majority of the land at issue (over 30,000 acres) falls within the first category enumerated above: allotted lands held in trust for tribal members. Pet. App. 12-13. Petitioners conceded below that even if this land were not reservation land under Section 1151(a), it would still be Indian country under Section 1151(c), which expressly addresses allotments. See *id.* at 28, 226. The State argues (State Pet. 27) that resolution of the disestablishment question is still important to the status of these lands, because, if there is no reservation, then these lands would cease to be Indian country if they were ever removed from trust status. But as a practical matter, very little of this land has been removed from trust status in recent years, and there is little reason to expect that much, if any, of it will be in the near future. See Gov't C.A. App. 175-197 (less than one allotment has been removed from trust in each of the last two decades).

b. Most of the land at issue that does not fall into the first category falls within the second: some 6000 acres of lands placed into trust under the IRA. Pet. App. 12-13. The court of appeals correctly concluded that this category of land is Indian country whether or not the formal Reservation was disestablished. *Id.* at 36-37. The IRA authorizes the Secretary of the Interior to acquire "land for Indians" "within *or without* existing reservations." 25 U.S.C. 465 (emphasis added). The court of appeals recognized, quoting this Court's decision in *City of Sherill* v. *Oneida Indian Nation*, 544 U.S. 197, 221 (2005), that the IRA "provides the proper avenue for a tribe to reestablish sovereign authority over territory." Pet. App. 36 (brackets omitted); see *id.* at 36-37 (citing *Chase* v. *McMasters*, 573 F.2d 1011, 1018 (8th Cir.), cert. denied, 439 U.S. 965 (1978); *United States* v.

Roberts, 185 F.3d 1125, 1131 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000); and *Langley* v. *Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985), for the proposition that IRA trust lands are Indian country). Petitioners do not challenge that conclusion in their identical questions presented, and nothing this Court decides on the disestablishment issue on which petitioners do seek review would place these lands within state jurisdiction.[9]

c. The third category of land at issue—roughly 900 acres of "agency trust land," reserved for the Tribe's benefit in 1894 and restored to the Tribe under the 1929 Act—comprises less than three percent of the total land, Pet. App. 12-13, and thus would not by itself merit this Court's attention. In any event, this land would qualify as an "informal" or "de facto" reservation under this Court's precedents, even if no formal Reservation existed. In *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991), this Court considered the status of lands that were not within the boundaries of a formally recognized reservation but that were held in trust by the United States for the benefit of a tribe. The Court concluded that, because the trust land was "validly set apart for the use of the Indians as such, under the superintendence of the Government," the trust land "qualifie[d] as a reservation." *Ibid.* (citation omitted); see *United States* v. *John*, 437 U.S. 634, 649 (1978) (observing that "[t]here is no apparent reason why these [trust] lands, which had been purchased [by the United States] in previous years for the aid of those Indians, did not become a 'reservation,' at least for the purposes of federal criminal juris-

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[9] As noted below, see p. 27, *infra*, these lands also meet the standards for an informal reservation more generally.

diction at that particular time"); see generally *Oklahoma Tax Comm'n* v. *Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (recognizing that Indian reservations, for purposes of 18 U.S.C. 1151(a), may be either "formal" or "informal").

The district court expressly recognized that the other two categories of land at issue in this case—the allotted trust lands and IRA trust lands—meet the standards for an informal reservation. Pet. App. 153-157. The district court concluded, based on the evidence presented, that "the federal government has validly set apart" those lands "for use of the Yankton Sioux Indians," observing that the federal Bureau of Indian Affairs handles leases and rents, and the Federal Bureau of Investigation exercises criminal jurisdiction, over that territory. *Id.* at 156. Similar considerations demonstrate that the agency trust land meets the standards for an informal reservation as well: the land was reserved for the purpose of providing "aid and education to tribal members so long as they were needed," *id.* at 21 (citation omitted); see 28 Stat. 316 (Pet. App. 342-343); was later "reinvested in the Yankton Sioux Tribe" when "no longer required for agency, school, and other purposes," Act of Feb. 13, 1929, ch. 183, 45 Stat. 1167; was exempted from allotment, thereby preventing its transfer to non-Indians, *ibid.*; see 69 Cong. Rec. 8837 (1928) (Sen. McMaster of South Dakota explaining that the lands would not be vulnerable to sale for taxes, and instead that the act would reinvest the lands "not for allotment but for reservation purposes, buildings, and so forth"); is held in trust for the Tribe with federal superintendence of leasing; and has been subject to federal criminal jurisdiction, Pet. App. 246.

d. Moreover, any tribal trust lands determined not to constitute either a formal or informal reservation under Section 1151(a) would satisfy the requirements of Section 1151(b) as a dependent Indian community. The district court expressly recognized that the federal government's treatment of the allotted trust lands and IRA trust lands qualified them as dependent Indian community under this Court's decision in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998). See Pet. App. 159-160. The analogous treatment of the agency trust land would similarly qualify it as dependent Indian community as well.

e. Because the lands in question would be Indian country if the formal Reservation no longer existed, there is no merit to the State's contention (State Pet. 35) that the court of appeals' decision has "created an untenable situation for those who must attempt to live in and govern the disputed area." Petitioners and amici raised a similar argument in support of rehearing below. Pet. App. 59. The court of appeals, in denying that request, quoted the government's observation that "despite a decade of experience with a * * * checkerboard Reservation" after the court of appeals' original ruling that the Reservation had not been disestablished, "this area of South Dakota has not experienced any of the problems described by the State, County, or *amici*." *Ibid.* (citation omitted).

In point of fact, because of the alternative grounds for Indian-country status of the lands at issue, the checkerboard pattern pre-dates the court of appeals' ruling on disestablishment, and would survive any decision on that issue by this Court. See, *e.g.*, Pet. App. 245-246 (noting longstanding federal exercise of criminal

jurisdiction over trust lands).[10] As this Court has previously recognized, a checkerboard jurisdictional pattern is not necessarily impracticable. See *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 265 (1992) (parcel-by-parcel determinations that state's tax assessor was required to make on checkerboard reservation were "not impracticable" and "do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally-owned, state-owned, and church-owned lands"). And the evidence in this case—which shows that the federal government has long exercised criminal jurisdiction over lands found by the court of appeals to constitute part of the Yankton Sioux Reservation—demonstrates that the pat-

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[10] One amicus brief implies that the question presented nevertheless has relevance because the Tribe's regulatory authority differs depending upon whether the land at issue is Indian country under Section 1151(c) or because it is part of a reservation. See Charles Mix Electric Ass'n et al. Amicus Br. 10-11. None of the cases cited by the brief, however, expressly discusses Section 1151(c), and the brief omits to discuss whether the other alternative grounds (*e.g.*, informal-reservation status) for considering this land to be Indian country might also give rise to differences in tribal regulatory authority. *Ibid.* The courts below neither addressed nor recognized any relevant jurisdictional distinctions between different types of Indian country, and no such issue is presented for this Court's review. In any event, this Court's precedents suggest that the precise type of Indian country does not matter for jurisdictional purposes. The same general principles of immunity from state taxation apply, for example, on any land that constitutes Indian country, whether the land is a formal reservation, see *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179-181 (1973); is held in trust for a Tribe but is not part of a formally designated reservation, see *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511; or is an allotment still held in trust or restricted status, see *Sac & Fox Nation*, 508 U.S. at 123.

tern here has not proven to be unworkable. Pet. App. 245-246. For that reason, and because the current jurisdictional boundaries should remain irrespective of a decision by this Court on the question presented, certiorari is unwarranted.

4. Petitioners, and some of their amici, suggest that certiorari is necessary in order to address the status of an additional category of land, namely, allotted land that passed into non-Indian hands after 1948, when 18 U.S.C. 1151 was enacted. See State Pet. 34-35; County Pet. 19; Cities' Amicus Br. at 1 n.2 & App.; Colin Soukup et al. Amicus Br. 4-5; Wagner Community Sch. Dist. Amicus Br. 2. But as the court of appeals made clear in response to the rehearing petitions, no issue regarding such land was "actually litigated or decided in this case." Pet. App. 55. Indeed, the panel revised its original opinion to eliminate any possible implication that any such issue had been decided. *Id.* at 56. Because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), petitioners' arguments about this fourth category of land provide no reason to grant certiorari.

5. Finally, should the Court nevertheless decide to grant certiorari to address the disestablishment question, it should deny the Tribe's conditional cross-petition. The conditional cross-petition presents the question whether the present-day Reservation includes all lands that were within the original 1858 Reservation boundaries, except for those ceded to the United States in the 1894 Act. See Conditional Cross-Pet. i. The additional lands at issue in the Tribe's conditional cross-petition are once-allotted lands that passed out of trust status and were sold to non-Indians. The United States has long exercised jurisdiction only over trust lands, not

these. Pet. App. 246-247. Although the United States supported the Tribe's position on this issue, the question does not warrant certiorari. Like the disestablishment issue presented by petitioners, the issue the Tribe raises involves only the application of settled law to this particular case. See Sup. Ct. R. 10. There is no need to review the disestablishment question, but even if the Court did grant review of that question, there would be no need to expand the scope of review to include other aspects of the court of appeals' reservation-specific and fact-bound ruling.

As the court of appeals observed, "both sides have followed an all or nothing strategy" in this case. Pet. App. 248. The outcome now lies between those poles in a manner that essentially preserves the jurisdictional status quo as it has long existed. Review of any or all of the court of appeals' decision is unwarranted and would serve little purpose. The Court therefore should deny certiorari, just as it did 11 years ago when petitioners and the Tribe filed certiorari petitions raising the same issues at an earlier stage of this litigation.

CONCLUSION

The petitions for writs of certiorari should be denied. If any of the petitions are granted, the conditional cross-petition should be denied.

Respectfully submitted.

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